

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2005-67-C - ORDER NO. 2005-367  
JULY 20, 2005

IN RE: Petition of MCImetro Access Transmission	)	ORDER DENYING
Services, LLC for Arbitration of Certain	)	PETITION FOR
Terms and Conditions of Proposed	)	REHEARING OR
Agreement with Farmers Telephone	)	RECONSIDERTION
Cooperative, Inc., Hargray Telephone	)	
Company, Home Telephone Co., Inc. and	)	
PBT Telecom, Inc. Concerning	)	
Interconnection and Resale under the	)	
Telecommunications Act of 1996.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing or Reconsideration of Order No. 2005-233 filed by Time Warner Cable Information Services, LLC (TWCIS). Because TWCIS states no new matter in its Petition, and we believe that Order No. 2005-233 correctly stated the law under the circumstances, we deny and dismiss the Petition.

On May 23, 2005, this Commission issued Order No. 2005-233 in this docket, which denied a TWCIS request to intervene in the arbitration proceeding between MCImetro Access Transmission Services, LLC (MCI) and Farmers Telephone Cooperative, Inc. (Farmers), Home Telephone Co., Inc. (Home), PBT Telecom, Inc. (PBT) and Hargray Telephone Co. (Hargray)(collectively, the ILECs).

TWCIS states that when it applied for authority to offer services in South Carolina, it informed the Commission and the ILECs that in order to offer service the

company had to establish a connection over the public switched telephone network (PSTN). Further, TWCIS also notes that it informed the Commission and the ILECs that it planned to establish that connection through its contract with MCI. According to TWCIS, the decision reached in this arbitration will have a critical impact on TWCIS' ability to provide service to customers in the ILECs' service areas, and that not allowing TWCIS to participate as a party of record in a contested case while the Commission decides issues directly affecting its contractual rights violates the Administrative Procedures Act (APA).

Further, TWCIS states that the South Carolina Constitution requires an administrative agency to give procedural due process even when the matter is not a contested case as defined in the APA. TWCIS states that its situation is unique and calls for a different result from the Commission's past decisions in order to protect TWCIS' due process rights.

Lastly, TWCIS argues that its rights have been substantially prejudiced by this Commission's failure to allow TWCIS to participate in this arbitration proceeding. According to TWCIS, the primary disputed issue in this arbitration is whether MCI will be able to serve TWCIS customers through its agreement with the ILECs. TWCIS states that it has rights in the ILEC's interconnection agreement with MCI as a third party beneficiary of the contract, and that the Commission's denial of TWCIS' request to participate is arbitrary, capricious and characterized by an abuse of discretion.

Again, these allegations are not new. Second, Order No. 2005-233 correctly stated the law on this matter. However, this Commission feels compelled to expand our discussion of our reasoning.

Arbitrations of agreements between telecommunications carriers are clearly matters of Federal law. 47 U.S.C. Section 252 (b) (1) clearly calls for participation in the arbitration process by parties to the original negotiation. The section reads, in part, as follows: “During the period from the 135<sup>th</sup> to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues (emphasis added).” Accordingly, it is clear after reading this and the preceding and subsequent sections of the Telecommunications Act of 1996 that non-participants in the negotiation process under Sections 251 and 252 of the Telecommunications Act of 1996 may not be participants in arbitration proceedings with regard to agreements between telecommunications companies. An arbitration proceeding is clearly the culmination of the negotiation process contemplated under Sections 251 and 252. TWCIS did not participate in the negotiation process in this case, therefore, it may not participate in the arbitration. TWCIS points to no Federal statutory, regulatory, or case authority that would compel a different result.

Further, even if we took the position that State law is applicable, the South Carolina cases cited by TWCIS are unavailing and/or supportive of this Commission’s holding. TWCIS points to *Garris v. Governing Board of SC Reinsurance Facility*, 333 S.C. 432, 511 S.E. 2d 48, 52 (1999) for the proposition that by not allowing it to

participate as a party of record in a contested case while the Commission decides issues directly affecting its contractual rights, the Administrative Procedures Act is violated. No such language appears in the case cited. The case does stand for the principle that procedural due process must be afforded even in non-contested cases. See also *Stono River Environmental Protection Association, et. al v. South Carolina Department of Health and Environmental Control*, 305 S.C. 90, 406 S.E. 2d 340 (1991). However, again, the arbitration process under the Telecommunications Act of 1996 and its participants are matters of Federal statutory law.

*Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App., 2000) holds that a party must show that it was substantially prejudiced by the administrative process to prove denial of due process in an administrative proceeding. According to TWCIS, the primary disputed issue in this arbitration is whether MCI will be able to serve TWCIS customers through its agreement with the ILECs, and that TWCIS has rights in the ILEC's interconnection agreement with MCI as a third party beneficiary of the contract. TWCIS then cites *Bob Hammond Construction Co., Inc. v. Banks Construction Co.*, 312 S.C. 422, 440 S.E. 2d 890, 891 (Ct. App., 1994) as support for its theory.

First, we disagree with TWCIS' characterization of the primary disputed issue in this arbitration. As shown by the record in this case, there were some seventeen issues presented in the "Disputed Language Matrix" in the case. Whereas some of the issues may certainly have been related to the service of TWCIS customers through MCI, it appears to this Commission that the issues also had general applicability to the service of

other customers through MCI as well. No evidence was presented during the hearing that the matters being arbitrated were primarily for the benefit of TWCIS. In addition, there were other disputed issues related to such matters as Calling Party Identification and Dispute Resolution/Continuation of Service that clearly had general applicability. Thus, we would characterize the TWCIS interest in this matter as incidental, rather than primary. Accordingly, we see no substantial prejudice as described under *Leventis*.

Further, the *Bob Hammond Construction* case holds that if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create direct, rather than incidental or consequential benefits to the third person. 440 S.E. 2d at 891. The litigant in that case (a subcontractor) was found to have only incidental benefits from the contract of others. Again, in the present case, we see only incidental benefits to TWCIS under the present contract. Accordingly, we do not believe that TWCIS has the right to enforce the contract resulting from this arbitration, and we also therefore do not believe that TWCIS had the right to participate in the arbitration in this matter. Certainly, our original denial of TWCIS' right to participate was not arbitrary, capricious, or characterized by an abuse of discretion, but based on sound reasoning under Federal law. Even if State law is applicable in the present case, it supports this Commission's position to exclude TWCIS from the arbitration.

JULY 20, 2005

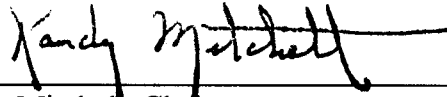
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Based on the above-stated reasoning, we therefore deny and dismiss the Petition.

This Order shall remain in full force and effect until further Order of the Commission.

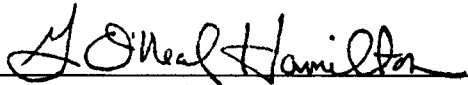
BY ORDER OF THE COMMISSION:



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Randy Mitchell, Chairman

ATTEST:



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G. O'Neal Hamilton, Vice-Chairman

(SEAL)